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WATER RESOURCES DEPT
SALEM, OREGON

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
WATER RESOURCES DEPARTMENT

In the Matter of the Determination of the Relative Rights of the Waters of the Klamath River,
a Tributary of the Pacific Ocean

~~PacifiCorp~~; John M. Mosby; Marilyn Mosby;
Robert Cook, TPC, LLC; ~~Rogue River Valley
Irrigation District; Medford Irrigation District;
Horsefly Irrigation District; Langell Valley
Irrigation District~~; Roger Nicholson; Richard
Nicholson; NBCC, LLC; Agri Water, LLC;
Maxine Kizer; Ambrose McAuliffe; Susan
McAuliffe; Kenneth L. Tuttle and Karen L.
Tuttle dba Double K Ranch; ~~Dave Wood~~;

PROPOSED ORDER

Case No. 285

Claim: 614 and 624

Contests: ~~2062~~¹, ~~3018, 3023~~², 3121³,
~~3251, 3256~~⁴, 3316, 3326⁵,
~~3646, 3656~~⁶, 3885, 4004, 4014

¹ PacifiCorp voluntarily withdrew that portion of Contest 2062 pertaining to Claims 614 and 624. See NOTICE OF WITHDRAWAL OF PORTION OF CONTEST dated March 13, 2007.

² WaterWatch of Oregon, Inc.'s Contests 3018 and 3023 were dismissed. ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003.

³ Change of Title Interest for Contest 3121 from Boyd Braren, Boyd Braren Trust to Robert Cook, TPC, LLC (10/25/05).

⁴ On October 21, 2003, Langell Valley Irrigation District and Horsefly Irrigation District voluntarily withdrew, without prejudice, Contests 3251 and 3256. Medford Irrigation District and Rogue River Valley Irrigation District voluntarily withdrew Contests 3251 and 3256 on June 14, 2006.

⁵ William Bryant voluntarily withdrew from Contests 3316 and 3326 on October 31, 2003. Dave Wood voluntarily withdrew from Contests 3316 and 3326 on October 26, 2004. Change of Title Interest for Contests 3316 and 3326 from Roger Nicholson Cattle Co. to AgriWater, LLC (2/4/05). Change of Title Interest for Contests 3316 and 3326 from Dorothy Nicholson Trust and Lloyd Nicholson Trust to Roger and Richard Nicholson (2/4/05). Change of Title Interest for Contests 3316 and 3326 from Kenneth Hufford, Leslie Hufford, and Hart Estate Investments to Jerry and Linda Neff (2/11/05). Change of Title Interest for Contests 3316 and 3326 from William and Ethel Rust to David Cowan (3/9/05). Change of Title Interest for Contests 3316 and 3326 from Walter Seput to James Wayne, Jr. (5/2/05). Change of Title Interest for Contests 3316 and 3326 from Jim McAuliffe, McAuliffe Ranches, and Joe McAuliffe Co. to Dwight and Helen Mebane (7/8/05). Change of Title Interest for Contests 3316 and 3326 from Anita Nicholson to Nicholson Investments, LLC (7/8/05). Kenneth Zamzow voluntarily withdrew from Contests 3316 and 3326 on July 8, 2005. Change of portion of Title Interest for Contests 3316 and 3326 from Dwight and Helen Mebane to Sevenmile Creek Ranch, LLC (8/15/05). William Knudtsen voluntarily withdrew from Contests 3316 and 3326 on September 13, 2005. Change of Ownership filed for Contests 3316 and 3326 reflecting that William V. Hill is deceased and his ownership rights transferred to Lillian M. Hill (6/15/06). Sevenmile Creek Ranch, LLC voluntarily withdrew from Contests 3316 and 3326 on March 1, 2007. Franklin Lockwood Barnes, Jr. and Jane M. Barnes voluntarily withdrew from Contests 3316 and 3326 on April 6, 2007. Mary Jane Danforth voluntarily withdrew from Contests 3316 and 3326 on June 19, 2008. Modoc Point Irrigation District voluntarily withdrew from Contests 3316 and 3326 on November 13, 2008. Change of Title Interest for Contests 3316 and 3326 from Robert Bartell to Michael LaGrande (1/9/09). Change of Title Interest for Contests 3316 and 3326 from Elmore E. Nicholson and Mary Ann Nicholson to Nicholson Loving Trust (12/8/09). Change of Title Interest for Contests 3316 and 3326 from Peter M. Bourdet to Peter Bourdet & Linda Long (12/10/09). Jacob D. Wood voluntarily withdrew from Contests 3316 and 3326 on January 15, 2010. Change of portion of Title Interest for Contests 3316 and 3326 from Roger Nicholson and Richard Nicholson to NBCC, LLC (3/17/2010). Change of Title Interest for Contests 3316 and 3326 from Dwight & Helen Mebane to Farm Credit West, PCA (7/20/2011), and from Farm Credit West, PCA to PCA Acquired Properties, LLC (7/20/2011), and from PCA Acquired Properties, LLC to Robinson Best, LLC (7/20/2011).

~~Kenneth Zamzow~~; Nicholson Investments, LLC;
William S. Nicholson; John B. Owens; Kenneth
Owens; William L. Brewer; ~~Mary Jane Danforth~~;
~~Jane M. Barnes~~; ~~Franklin Lockwood Barnes, Jr.~~;
~~Jacob D. Wood~~; ~~Elmore E. Nicholson~~; ~~Mary
Ann Nicholson~~; Nicholson Loving Trust; Gerald
H. Hawkins, Hawkins Cattle Co.; Owens &
Hawkins; Harlow Ranch; Terry M. Bengard;
Tom Bengard; Robinson Best, LLC; ~~Dwight T.
Mebane~~; ~~Helen Mebane~~; ~~Sevenmile Creek Ranch,
LLC~~; James G. Wayne, Jr.; Clifford Rabe; Tom
Griffith; William Gallagher; Thomas William
Mallams; River Springs Ranch; Pierre A. Kern
Trust; ~~William V. Hill~~; Lillian M. Hill; Carolyn
Obenchain; Lon Brooks Newman Enterprise;
~~William C. Knudtsen~~; Wayne Jacobs; Margaret
Jacobs; Michael LaGrande; Rodney Z. James;
Hilda Francis for Francis Loving Trust; David
M. Cowan; James R. Goold for Tillie Goold
Trust; Duane F. Martin; ~~Modoc Point Irrigation
District~~; ~~Peter M. Bourdet~~; Peter M. Bourdet &
Linda Long; Vincent Briggs; J.T. Ranch Co.;
Tom Bentley; Thomas Stephens; John Briggs;
~~William Bryant~~; Peggy Marengo; Jerry L. and
Linda R. Neff;

Contestants

vs.

United States, Bureau of Indian Affairs as
Trustee on behalf of the Klamath Tribes;
Claimant/Contestant, and

The Klamath Tribes;
Claimant/Contestant.

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PROCEDURAL HISTORY

This proceeding under the provisions of ORS Chapter 539 is part of a general stream adjudication to determine the relative rights of the parties to waters of the various streams and reaches within the Klamath Basin.

⁶ Klamath Project Water Users voluntarily withdrew/dismissed Contests 3646 and 3656 on October 6, 2002. See APPROVAL AND ORDER OF HEARING OFFICER DATED December 6, 2002 (*nunc pro tunc*); and CONTEST DISMISSAL AGREEMENT AND STIPULATION BETWEEN KLAMATH PROJECT WATER USERS, THE KLAMATH TRIBES, AND THE UNITED STATES; [PROPOSED] ORDER OF THE HEARING OFFICER IN CASE 003 dated December 6, 2002.

Klamath Case 285 involves claims to approximately 140 seeps and springs (springs) located on lands of the former Klamath Indian Reservation. Claimants are the Klamath Tribes (Tribes) and the United States Bureau of Indian Affairs (BIA) as Trustee on behalf of the Tribes.⁷ Contestants are individually represented landowners as well as a larger conglomeration of landowners referred to throughout this adjudication as the Upper Basin Contestants (UBC).

On or about April 30, 1997, Claimants filed several claims for instream water rights to support the Tribes hunting, fishing, trapping and gathering rights on former reservation land. On October 1, 1999, Claimants filed amendments to each of the claims at issue here. On or about October 4, 1999, OWRD issued preliminary evaluations (PE) on each claim. Thereafter, UBC and other contestants filed the Statements of Contest (Contests) at issue in this case. Claimants also contested those portions of the PEs that proposed reduction, limitation, or denial of portions of the claims filed. The claims were consolidated into eight cases. Unlike the claims for individual water rights filed in this adjudication, Case 285 involves Tribal claims for non-consumptive water rights. Unlike most claims filed by Claimants in this adjudication, Case 285 does not include claims for instream flows for physical fish habitat. Nor does this case seek increases in water levels or streamflows to restore degraded habitat. Instead, Case 285 seeks to preserve the current state of natural springs within the former reservation, as well as the surrounding riparian environments.

On July 8, 2005,⁸ the Tribes and the BIA filed a Joint Motion for Ruling on Legal Issues (Summary Determination). On that same date, UBC filed its own Motion for Ruling on Legal Issues. On February 13, 2007, Administrative Law Judge (ALJ) Maurice L. Russell II issued an Amended Order on Motions for Rulings on Legal Issues (Amended Order). In the Amended Order, ALJ Russell disposed of several contest grounds presented by UBC. In addition, ALJ Russell confirmed, *inter alia*, that the Tribes possessed treaty rights to hunt, fish, trap and gather on former reservation lands. Accordingly, ALJ Russell determined, as a matter of law, the Tribes possessed federally reserved water rights to whatever water is necessary to fulfill the purpose of the reservation. The priority date for the Tribes instream water rights was declared as "time immemorial." Through rulings in the Amended Order, ALJ Russell left only the quantification of Claimants' water rights for hearing.⁹

⁷ Claimants also hold status as contestants in this matter with regard to certain findings and determinations contained in the PEs. For clarity, the Tribes and BIA will be referred to as Claimants throughout this order.

⁸ Between 1999 and 2010, the parties engaged in extensive discovery and motions practice. From its inception, this matter has been presided over by no less than four separate Administrative Law Judges from the Office of Administrative Hearings. The rulings of each are part of the record in this matter. A detailed discussion of all prehearing matters is unnecessary for the purposes of this order.

⁹ In the Amended Order, ALJ Russell summarized his rulings as follows:

1. The Tribes have an Article 1 right to hunt, fish, trap and gather on the former reservation lands, and an associated federal reserved water right accompanying it, with a priority of time immemorial.
2. *Adair I* and *Adair II* are controlling precedent throughout the former reservation lands in the particulars noted above.
3. The quantification process for determining the amount of water will be a modified two-step process: Claimants have the burden to show the amount of water necessary to build or preserve a viable and self-renewing population of treaty species, including the healthy and productive habitat necessary to such a population, sufficient for the exercise of the Tribes' aboriginal rights, and

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On or about December 22, 2009, Contestants filed an Amended Statement of Contest (Amended Contest) as permitted by the scheduled of proceedings in this matter. In the Amended Contest, Contestants incorporated previously raised contests and asserted new contests to the claims.¹⁰

On February 26, 2010, the parties filed written direct testimony and exhibits. On April 2, 2010, The Office of Administrative Hearings (OAH) assigned Senior ALJ Joe L. Allen to preside over all further proceedings in the Klamath Basin Adjudication. On July 6, 2010, the parties filed written rebuttal testimony and exhibits.¹¹ An in-person cross-examination hearing was scheduled for July 26, 2010, in Salem, Oregon with Senior ALJ Allen presiding. Prior to the hearing, the parties notified ALJ Allen that none intended to conduct cross-examination of any witness.

Contestants have the burden to show that a lesser amount of water will accomplish the same healthy, productive habitat.

4. The "as currently exercised" language in *Adair II* does not refer to a level of water based upon any specific date; rather, it refers to determining the appropriate healthy, productive habitat in the present, as opposed to trying to recreate the situation in 1864, at the time the treaty was signed.

5. There were two primary purposes to the Treaty of 1864. The Article 2 purpose was agricultural, and had a priority date of October 14, 1864. The Article 1 purpose was a reservation of the Tribes' aboriginal right to hunt, fish, trap and gather, with a priority date of time immemorial.

6. The Tribes are entitled to an instream flow through the former reservation lands which is sufficient to fulfill the purposes of the reservation, and no more.

7. The parties are not limited to the evidence provided in the 1970 ODFW report. They may offer whatever evidence they choose, subject to admissibility, including whatever methods they consider appropriate, to determine the amount of water required to satisfy the Tribe's treaty rights on the former reservation lands.

8. The recognition of Tribal water rights on the former reservation lands does not create an equal protection issue under the Constitution.

9. OWRD has a statutory responsibility to provide hydrology data on water availability in these claims on request. The parties may rely upon the OWRD data, or they may attack that data or supplement that data.

(Amended Order at 27 and 28. **Bold and strikethrough** omitted.)

¹⁰ ORS 539.110 provides, in relevant part, "* * *[t]he evidence in the proceedings shall be confined to the subjects enumerated in the notice of contest." Contestants raised several new challenges to the claims through the Amended Contests. However, some issues were deemed inapplicable and irrelevant at the outset of the hearing. Accordingly, evidence on those issues was excluded as irrelevant. Those rulings are part of the permanent record in this proceeding. A protracted discussion of those rulings is therefore unnecessary in this order. As such, only those contest grounds not disposed of through the Amended Order or through rulings on the record, during other proceedings, are discussed herein.

¹¹ The parties assigned exhibit numbers to the direct and rebuttal testimonies of each witness. For clarity, references to direct or rebuttal testimony in this order will cite to the exhibit number assigned by the party proffering such testimony.

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EVIDENTIARY RULINGS

Prior to the date set for the in-person hearing, the parties in this matter filed more than 450 exhibits, consisting of thousands of pages, including written direct and rebuttal testimony. Pursuant to an instruction from the ALJ, the parties filed written objections to evidence and testimony on or about July 13, 2010. The parties filed responses to objections on or about July 20, 2010. The ALJ issued a written ruling on objections on or about August 6, 2010. That ruling is part of the record in this matter and therefore it is unnecessary to reiterate those evidentiary rulings in this order.

EXPERT TESTIMONY

This case, like many others in this adjudication, presents expert testimony that is in direct conflict regarding facts relevant to a determination in this matter. Each party's experts opined extensively about the amount of water necessary to establish healthy and productive habitat for the exercise of the Tribes' treaty rights. The parties' experts have also come to significantly different conclusions about how much water is necessary to accomplish the stated goals. Despite the wealth of knowledge presented by Claimants and UBC, only one side's calculations can be accepted as reliable. In this matter, either Claimants are correct, that the claims presented represent the minimum amount of water necessary, or UBC is correct in its assertions that a lesser amount will do.¹² These contradictions must therefore be resolved through a determination of which evidence is entitled to greater weight.

Claimants have presented testimony and exhibits from a Professional Civil Engineer with extensive experience hydrology and environmental engineering. In addition, Claimants proffered the testimony and exhibits of a wildlife biologist and ecologist. These experts discussed, at length, the results of studies conducted at spring sites within the basin and the need for the water and riparian vegetation provided at these sites. In contrast, Contestants provided testimony from individuals who questioned the methodologies and results of Claimants' experts. Contestants' witnesses also debate the impact of water as a limiting factor upon treaty species populations. This evidence, however, fails to adequately address the underlying issue of quantification of the Tribes' water rights.

Contestants' experts make either general assertions regarding limiting factors of treaty species or assertions unsupported by the evidence. On the whole, Contestants' evidence criticizes but fails to rebut Claimants' evidence. Testimony provided by Claimants' experts is well supported by verifiable evidence. It also appears well reasoned in its conclusions. For these reasons, greater weight is given to the testimony of Claimants' experts.

¹² A third possibility, that both sides are incorrect and some other, unstated, amount of water is sufficient, is not considered. No party has presented such evidence and the necessary calculations are beyond the abilities of this tribunal.

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ISSUES

1. Whether the claimed flows are necessary to establish a healthy and productive habitat to allow the exercise of the Klamath Tribes' hunting, fishing, trapping, and gathering rights guaranteed by the treaty of 1864.
2. Whether the Amended Claims filed October 1, 1999 are permissible under ORS 539.210 and OAR 690-030-0085.
3. Whether the Tribes' treaty rights have been extinguished on lands no longer owned by the Tribes.
4. Whether the Klamath Restoration Act of 1986 limited the restoration of the Tribes' treaty rights on former reservation land.

FINDINGS OF FACT

The Treaty of 1864 and applicable case law.

1. The Klamath Tribes (including the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians) entered into a treaty with the United States on October 14, 1864. Article 1 of the Treaty involved cession of approximately 20 million acres of land to the United States in return for the establishment of the Klamath Reservation. Article 1 also reserved to the Tribes the "exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits * * *." Article 2 of the Treaty provided for payment for the cession of the Tribes' lands, and announced the purpose of promoting the Tribes in civilization, particularly agriculture. (Treaty of 1864.)

2. In 1975, the United States, as trustee for the Tribes, filed a lawsuit in federal court against several water users in the Klamath Basin, primarily along the Williamson River and its tributaries. The government sought to establish the priorities of its claimed federal reserved water rights. In 1979, the District Court issued an opinion finding that the Klamath Tribes had an aboriginal water right to accompany their right to hunt, fish, trap and gather on the former reservation lands. The court further found that the Termination Act of 1954 did not extinguish those aboriginal rights. The court considered the Tribes' exercise of its aboriginal rights to hunt, fish, trap and gather¹³ to be one of the primary purposes of the Treaty of 1864. *U.S. v. Adair*, 478 F.Supp. 336 (1979) (*Adair I*).

3. In 1983, the Ninth Circuit affirmed *Adair I*, concluding that the District Court had been correct but adding its own ideas about the quantification process. *U.S. v. Adair*, 723 F.2d 1394 (1983) cert den (1984) (*Adair II*).

¹³ The fish, animal, and plant species subject to the Tribes' aboriginal rights are referred to throughout this order as "treaty resources."

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Wildlife species subject to the Tribes' treaty rights.

4. The Tribes' culture, cosmology, and way of life are based upon hunting, fishing, gathering, and trapping in their aboriginal homeland. Treaty resources provide food, clothing and tools for tribal families. Treaty resources are also central to the Tribes' religious and cultural practices and have been so since before creation of the reservation. This is demonstrated by the Tribes' Return of C'waam and First Salmon Ceremonies. (Exs. 285-KT-1 and 285-KT-100.)

5. Traditionally, the Tribes have hunted and trapped several species on former reservation land. These include but are not limited to deer, elk, antelope, bear, beaver, rabbit, ducks, and geese. Tribal members also harvest duck and goose eggs from riparian areas along the streams within the former reservation. Historically, tribal members would move to hunting camps along rivers and streams within the basin for the summer months. Some tribal families continue this practice today. (Exs. 285-KT-1, 285-KT-5 through 285-KT-7, and 285-KT-100.)

6. Tribal members traditionally gather several varieties of riparian plant species for use as food or medicine, as well as making traditional hunting and gathering tools. In addition, many riparian plant species are used in traditional tribal ceremonies. These species include apos, aspen trees, camas, cattail roots, chokecherries, currants, dock seeds, elderberries, foxtail grass and seeds, Klamath plums, Oregon grapes, and other wild berries and roots. Several species of trees found in these riparian habitats provide means of drying fish as well as wood for tool making. These include, lodge pole pine, aspen, cottonwood, and willow. (Ex. 285-KT-1, 285-KT-4, and 285-KT-100.)

7. Species hunted and trapped by the Tribes use springs as a source of water when crossing lands of the former reservation. Treaty species also use riparian environments surrounding the springs as cover, forage, nesting, and for giving birth. Intermittent sources of water are necessary to sustain a viable self renewing population of treaty wildlife species. A healthy riparian environment is also necessary to attract many species subject to the Tribes aboriginal rights. Likewise, a healthy riparian environment is necessary for the propagation of plant species harvested by the Tribes. (Exs. 285-KT-1 and 285-US-300.)

Claims and contests.

8. On or about April 30, 1997, the Klamath Tribes filed a Statement and Proof of Claim to the Use of Surface Waters of the Klamath River and its Tributaries¹⁴ (Claim 614). Through Claim 614, the Tribes adopted Claim 624 filed by the BIA as trustee on behalf of the Tribes. On October 1, 1999, the Tribes filed an Amended Statement and Proof of Claim. This Amended Claim 614 adopted and incorporated Amended Claim 624. (OWRD Ex. 61 at 1 through 13.)

9. On April 30, 1997, the BIA filed Claim 624. Claim 624 identified seeps and springs (springs) within the Klamath Basin, which the BIA purported were necessary to fulfill the purposes of the reservation created by the Treaty of October 14, 1864 between the United States

¹⁴ Statement and Proof of Claims are referred to throughout this order simply as claims.

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and the Klamath Tribes. Claim 624 identified static spring flow quantities in cubic feet per second (cfs). The priority date for each claim was declared to be "time immemorial." (OWRD Ex. 62.)

10. Claim 624 identified 333 springs, assigned a site identification number to each spring, and provided the spring name, where applicable, and the location of the spring using the Universal Transverse Mercator (UTM) coordinate system.¹⁵ Claimants assigned a flow level of 0.1 cfs to all spring sites not visited at the time of the initial claim filing. (OWRD Ex. 62 at 3 through 77 and 83.)

11. On December 16, 1998, Dick Bailey, Administrator¹⁶ for OWRD, sent a letter to Michael Gheleta, a federal attorney representing the government's interests in this adjudication (1998 letter). The letter contained the heading, "Re: Klamath Basin Adjudication". The letter, responding to several inquiries from the BIA regarding amending claims in this adjudication, provided, in relevant part:

Process for amending a claim.

* * *. A claimant may submit a requested amendment in writing to the Department. * * * [T]he request should clearly identify the claim to be amended and the amendment sought, and should include supporting documentation of the requested amendment.

Timing of claim amendments.

* * *. OAR 690-[0]30-[0]085 provides that the Department may not allow any claim amendment after the commencement of open inspection. The Department does not intend to close the amendment period before commencement of open inspection, **and will accept claim amendments for filing until the close of business on the day before commencement of open inspection.** * * *. The Department is required to give notice at least 10 days before the commencement of open inspection. ORS 539.090.

(*Italics original, bold emphasis added.*)

12. On October 1, 1999, the BIA filed an Amended Statement and Proof of Claim for Claim 624. Between 1997 and 1999, the BIA discovered many of the previously identified springs either did not show evidence of an active spring or were located on private lands. As a result, Amended Claim 624 reduced the number of claimed springs to 172. In the amended

¹⁵ In direct testimony, BIA withdrew 32 spring sites from Claim 624. The UTM location for each remaining spring site is included in the identified exhibit as well as Attachment A to this order. Disputes as to the location of any individual springs have been resolved by OWRD and Claimants. As such, an exhaustive listing of those coordinates is unnecessary in the findings of fact.

¹⁶ The ALJ takes official notice that Mr. Bailey was also, at the time of issuance of the referenced letter, the Adjudicator with primary responsibility for overseeing the Klamath Basin Adjudication. Pursuant to OAR 137-003-0615, any party objecting to official notice must object, in writing, stating all grounds for the objection, no later than 5 days after the date this order is issued by the OAH. Any objections must be provided to the other party at the same time they are filed with the OAH.

claim, the BIA adjusted the claimed flows to accurately reflect hydrologic data collected between 1997 and 1999. The amended claim again reflected a static flow amount for each spring throughout the year. Amended Claim 624 also provided supplemental location information for each site using the public land survey system identifying township, range, section, quarter, quarter.¹⁷ By October 1999, Claimants had visited and measured each spring site identified in the amended claim. (OWRD Ex. 62 at 83 through 149 and Ex. 285-US-100.)

13. The open inspection period commenced with the issuance of the Preliminary Evaluations on October 4, 1999. (OWRD Ex. 62 at 255 and 256; *see also*, OWRD Closing Argument at 4 fn. 30.)

14. In February 2010, Claimants filed their written direct testimony and exhibits. Claimants' evidence reflected downward adjustments of many of the flows in Claim 624. These downward adjustments resulted from continuing studies of the seeps and springs, conducted by BIA's experts. The updated claim was capped at the 1999 amended claim level. The updated claim further reduced the number of claimed spring sites to 140 throughout the former reservation lands. (Exs. 285-US-100.)

Hydrology of the seeps and springs and development of wildlife habitat claims.

15. Claimants' experts visited suspected spring sites throughout the 1990's and again starting in 2005. Springs were located using GPS coordinates, United States Geological Survey (USGS) and United States Forest Service (USFS) maps, as well as field notes from previous site visits. (Exs. 285-US-100 and 285-US-300.)

16. For locations where an active above ground spring could not be observed, Claimants' experts located the spring site by verifying indicators of recent water presence, including soil depressions and cracked surface soil, along with other characteristics of spring sites. Claimants' experts also used the presence of wetland vegetation to verify spring sites. (Exs. 285-US-100 and 285-US-300.)

17. Once all springs were located, Claimants' hydrologist, Claire Yoder, P.E., compiled site descriptions, photographs, discharge measurements, as well as open water and vegetation area measurements. Claimants' wildlife ecologist and biologist, Kenneth Raedeke, Ph.D., collected data on riparian vegetation, evidence of wildlife use, wetland vegetation types where applicable, and accessibility of the spring to wildlife species. (Exs. 285-US-100, 285-US-105 through 285-US-247, and 285-US-300.)

18. Where possible, Ms. Yoder measured the flow using either a volumetric method or a depth and velocity measurement. Where physical measurements were not possible, Ms. Yoder used accepted estimating techniques to calculate the flow velocity. (Exs. 285-US-100.)

19. At site locations where flowing water was not observed, Claimants' experts looked for typical spring characteristics indicating water flowing at other times of the year. These

¹⁷ As with UTM coordinates, the Township/Range identifications for each remaining spring site are included in the identified exhibit as well as Attachment A to this order. Because no disputes remain over site locations, an exhaustive listing of those coordinates is unnecessary in the findings of fact.

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included dry channels or ponds, depressions in the ground, and mud or dry cracked soil. In such cases, Claimants' experts used the United States Army Corps of Engineers (USACE) wetland determination system (USACE 1987 Wetland Determination Manual) to confirm the observed characteristics were the result of spring activity. (Exs. 285-US-100 and 285-US-300.)

20. Where flows could not be observed or documented, Dr. Raedeke, along with a team of scientists under his direction, estimated the amount of water consumed by target treaty species (in this instance, deer and elk) as well as the amount of water lost through evapotranspiration (plant use and soil evaporation). (Exs. 285-US-100, 285-US-300, and 285-US-308.)

21. In those instances where flows were documented but could not be measured, site flows were quantified using a three-part analysis which included consideration of water losses from evapotranspiration from vegetation, evaporation from open water areas, and wildlife consumption. (Exs. 285-US-100 and 285-US-300.)

22. Dr. Raedeke reviewed published scientific literature to determine which treaty species derived specific benefits from the water, forage, and cover provided by the springs within the former reservation. (Exs. 285-US-300 and 285-US-303 through 285-US-306.)

23. Dr. Raedeke determined the springs on the former reservation were particularly important to deer and elk due to these species needs for water and succulent vegetation and the long distances between rivers and streams within most areas of the basin. Dr. Raedeke also determined the riparian environments provided by the springs provide critical forage and cover for treaty species. Dr. Raedeke concluded that such water sources were necessary for the survival of treaty species within the basin. (Exs. 285-US-300 and 285-US-308.)

24. Dr. Raedeke observed that treaty species, particularly deer and elk, may be limited in distribution by the availability of drinking water or succulent forage during the driest months of the year (July through October). Dr. Raedeke also determined that preservation of the springs is necessary for viable self-renewing populations of treaty species within the former reservation. (Exs. 285-US-300 and 285-US-308.)

25. The updated flows are represented in Table 3 of the Affidavit and Direct Testimony of Claire Yoder and incorporated by reference as Attachment A to this order.¹⁸ (285-US-100 at 116 through 127.)

CONCLUSIONS OF LAW

1. The claimed instream flows are necessary to establish a healthy and productive habitat to allow the exercise of the Klamath Tribes' hunting, fishing, trapping, and gathering rights guaranteed by the treaty of 1864.

2. Claimants' Amended Claims filed October 1, 1999 are not prohibited by ORS 539.210 or OAR 690-030-0085.

¹⁸ Certain site locations have been corrected by stipulation of the parties through closing briefs. Attachment A reflects those corrections.

3. The Tribes' treaty rights have not been extinguished on lands no longer owned by the Tribes.

4. The Klamath Restoration Act of 1986 did not limit the restoration of the Tribes' treaty rights on former reservation land.

OPINION

I. Burden of proof.

The parties in this matter have spent significant amounts of time arguing various interpretations and applications of the burdens of proof applicable to this and other cases involving Claimants' instream water rights claims. Much of this argument stems from competing interpretations of the district court's opinion in *United States v. Adair*, 478 F. Supp. 336 (1979) (*Adair I*), the Ninth Circuit's opinion in *United States v. Adair*, 723 F.2d 1394 (1983) (*Adair II*), and the Amended Order on Motions for Rulings on Legal Issues (Amended Order) issued by Administrative Law Judge Maurice "Skip" Russell on February 12, 2007.

As a starting point, in a contested case hearing, the proponent of a fact or position has the burden of proving that fact or position by a preponderance of the evidence. ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

1. Burden of proof under ORS Chapter 539 and the Administrative Procedures Act.

In addition to the general standards of proof identified above, OWRD has expressly stated the allocation of the burden with regard to claims in this adjudication. The burden of establishing a claim to water in the Klamath Basin lies with the claimant whose claim is contested. ORS 539.110. A claimant of a water right must establish their claim by a preponderance of the evidence. OAR 690-0028-0040(1).

Contestants argue Claimants, in order to satisfy their burden, are required to quantify the Tribes' resource needs and show water claimed is necessary for the current exercise of the Tribes' treaty rights. I cannot agree.

Contestants' arguments advocate for the application of a burden of proof that exceeds the scope of this adjudication. As identified more fully below, the purpose of this adjudication is limited to the quantification of the Tribes' instream water rights necessary to fulfill the purposes of the reservation established by the Treaty of 1864. Limitations of that water right based on use of resources are beyond the scope of this adjudication and must be addressed, if at all, by a court of competent jurisdiction.

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Likewise, to require Claimants to demonstrate the Tribes' "current exercise" of its treaty rights would exceed the scope of this adjudication and be extremely unhelpful. It is my opinion that the "as currently exercised" language found in the *Adair* line of cases and relied upon by UBC refers to the moderate living standard articulated by the court in *Adair II*. As discussed more fully below, the moderate living standard has no application to the quantification of the instream water rights at issue here; at least not at this stage.

Pursuant to the above statutes and rules, Claimants have the burden to establish their claims by a preponderance of the evidence. Failure to support the claims with reliable, probative, and substantial evidence is detrimental to such claims. See ORS 183.450(5). Having identified Claimants' burden is not, however, the end of the discussion.

Contestants also have concurrent burdens in this matter. The evidence in these proceedings is confined to the subjects identified in the timely filed notice(s) of contest. See, ORS 539.110. Contestants are the proponents of each fact or position raised in the contests. As such, Contestants must present evidence to support each fact or position so raised. This burden of proof encompasses two burdens, the burden of production and the burden of persuasion. *Marvin Wood Products v. Callow*, 171 Or App 175 (2000) (Conceptually, the burden of proof encompasses two distinct burdens: the burden of producing evidence of a particular fact (*i.e.*, the burden of production), and the burden of convincing the trier of fact that the alleged fact is true (*i.e.*, the burden of persuasion)). To allow Contestants to assert contest grounds without supporting such contests with reliable, probative, and substantial evidence would be antithetical to the statutes and rules governing contested case proceedings generally and this adjudication specifically.

2. *The "moderate living" standard and its applicability to the quantification of instream water rights claimed by the Klamath Tribes and the United States Bureau of Indian Affairs.*

Throughout this adjudication, the parties have struggled with quantification standards and the application of the "moderate living" standard articulated by the court in *Adair II*. After much deliberation, I find the moderate living standard is inapplicable to this adjudication. On this point, I find myself in agreement with United States District Judge Owen Panter, as well as ALJs Barber and Russell. Judge Panter addressed the quantification standards and the moderate living standard in *United States v. Adair*, 187 F. Supp. 2d 1273 (2002) (*Adair III*), later vacated on ripeness grounds. While *Adair III* is not binding upon the parties, I find Judge Panter's opinion provides instructive guidance on these and other issues relevant to the resolution of the claims before me.

In *Adair III*, Judge Panter declared:

[T]he assertion that the tribes are entitled only to some "minimum amount" of water is an incorrect statement of the law. In quantifying the right under *Adair I*, the Tribe is entitled to "whatever water is necessary to achieve" the result of supporting productive habitat. [Citation to *Adair I* omitted]. *Once the adjudicator has quantified the Tribes' water rights under the principles announced in Adair I, the moderate living standard may be considered.*

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Under the traditional application of the moderate living standard, the initial quantification of a reserved right may be limited “if tribal needs may be satisfied by a lesser amount.” [Citation to *Fishing Vessel* omitted]. However, this case is unlike *Fishing Vessel* where the reserved right could be reduced without completely frustrating the purpose of the reservation. For example, if the tribes’ 50% allocation of the harvestable fish run at issue in *Fishing Vessel* would have been reduced to a 35% allocation, the reserved right would still survive after the reduction. In contrast, the Klamath Tribes’ reserved water right does not readily lend itself to such a reduction. *Ultimately, the water level cannot be reduced to a level below that which is required to support productive habitat*, and the Tribes are entitled to “whatever water is necessary to achieve” the result of supporting productive habitat. * * * Reducing the water below a level which would support productive habitat would have the result of abrogating the reserved rights.

Adair III, 187 F. Supp 2d at 1285 (emphasis added). Judge Panter correctly points out that application of the moderate living standard might be appropriate, but only *after* the adjudicator has quantified the Tribes’ water rights. As such, I believe this is an issue for resolution by the United States District Court or other court of general jurisdiction, not this tribunal.

The application of the moderate living standard would require economic and social analyses beyond the scope of this adjudication. It would likely require a year-by-year analysis of the Tribes’ harvest of treaty resources in conjunction with other, possibly innumerable economic resources available to each individual tribal member. The moderate living standard presents a question of “take” of treaty resources, not of quantity of available resources. It would be difficult, if not impossible, to apply the moderate living standard to the quantification of the Tribes water rights. It is possible the Tribes may exceed a moderate living through exploitation of treaty resources; nonetheless, I cannot envision a level of water in the Klamath Basin that would trigger such excess. Because the water rights at issue are non-consumptive, water allocated by such rights is not a resource to be directly exploited by the Tribes. Instead, it is the means by which healthy and productive instream and riparian habitats will be created and maintained to enable the Tribes to exercise their treaty rights.

A healthy and productive habitat may exist independent of the quantity of treaty resources harvested from it. The Tribes’ harvest practices, not the water right established herein, will drive their “take” of a given resource. Regardless of the take of a given treaty species necessary to provide the Tribes with a moderate living, the fact remains that the Tribes are entitled to a sufficient quantity of water to fulfill the purposes of the reservation, to wit, the exercise of the Tribes hunting, fishing, trapping, and gathering rights. This requires sufficient water to maintain a healthy and productive habitat for all treaty species subject to harvest. The amount at which harvest of a given treaty species may cause the Tribes to exceed a moderate living standard is irrelevant to the quantification of water necessary to provide a healthy and productive habitat. As such, it is beyond the scope of these proceedings. The moderate living standard serves as a measure of the limits of the Tribes’ take of treaty resources. It is not, contrary to UBC’s assertions, the appropriate measure of a water right necessary for a healthy

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and productive habitat. Such considerations are beyond the scope of these quantification proceedings.

II. Sufficiency of Claimants' proof.

Next, Contestants argue Claimants' proof is insufficient to establish the basis for a decree of water rights because it lacks the level of specificity demanded by UBC. I do not agree. Claimants have submitted substantial scientific data supporting each of the elements of the claimed water rights. Claimants' evidence is the product of several years of study by expert hydrologists as well as wildlife biologists and ecologists under the direction of Dr. Raedeke. The flows are appropriately quantified and the spring sites identified using the public land survey system as well as UTM coordinates.

In addition to the scientific evidence presented, Claimants have provided significant cultural and historical data to support the claimed treaty resources associated with claimed spring flows. This data focused on the historical use of identified treaty species found in the riparian habitat surrounding the springs as well as those treaty species that rely on the springs for water consumption. Such resource use data derives from Tribal members (Mitchell and Chocktoot) with experience in Tribal subsistence practices and Tribal government.

Contestants' arguments for a greater level of specificity in proof, than that offered by Claimants, essentially advocates for a standard of proof that exceeds a preponderance of the evidence. As discussed above, the standard applicable to this adjudication is proof by a preponderance of the evidence. Contestants provide no legal basis for deviating from this standard of proof. As such, Claimants' evidence is sufficient to prove their claims if it establishes such claims by a preponderance of the evidence. No greater level of proof will be required in this adjudication.

III. Amended claims.

Through contest amendments and closing briefs, Contestants argue Claimants' amended claims, filed October 1, 1999, are impermissible because they expand upon the initial claims and therefore constitute new claims under the Department's interpretation of the terms "amendment" and "new matter." OWRD asserts, in closing briefs, that because no extension beyond the April 30, 1997 deadline was granted by the Department, those amended claims for increased flows constitute new claims rather than amended claims. Claimants rely on the 1998 letter from OWRD, as well as the Department's position in other cases throughout this adjudication, to support their position that claim amendments were permissible until the commencement of the open inspection period. The parties each rely, to varying degrees, on ORS 539.210, OAR 690-030-0085, and OAR 690-028-0065 to support their arguments. Claimants also point out that this issue has been addressed by ALJ Russell in the Amended Order.

As a preliminary matter, it is important to note that, while ALJ Russell did address this argument in the Amended Order, he did not dispose of the contest raised by UBC. Rather, ALJ Russell simply refused to summarily dismiss Claimants amended claims or limit such claims to the amounts reflected in the initial claim. For that reason, the arguments raised by Contestants and OWRD must be addressed in this order.

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ORS 539.210 provides, in relevant part:

Whenever proceedings are instituted for determination of rights to the use of any water, *it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law.* Any claimant who fails to appear in the proceedings and submit proof of the claims of the claimant shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings, and shall be held to have forfeited all rights to the use of the water theretofore claimed by the claimant.

(Emphasis added.)

OWRD insists “ORS 539.210 requires that all seeps and springs quantities be limited to the amount originally claimed in 1997.” (OWRD Closing Argument at 4.) OWRD asserts the time required by law was the initial claim filing deadline of April 30, 1997 established administratively by OWRD. The Department contends that, because OAR 690-028-0065(3) requires the director to “set a time certain for statements and proofs of claim,” the initial claim filing deadline becomes the time “required by law” under ORS 539.210. I cannot agree.

As an initial matter, it is important to note discrepancies between OWRD’s position, regarding claim amendments prior to open inspection, in this case and its position in prior cases in this adjudication. While each case must be decided on its own merits, it is impossible to ignore official positions declared by the Department in prior cases argued contemporaneously with this matter. Nonetheless, that is essentially what the Department’s arguments ask this tribunal to do in order to accept its position regarding the April 30, 1997 deadline.

In no less than four other cases pertaining to Claimants’ non-consumptive instream water rights on the former reservation, OWRD has expressed its position regarding such deadlines rather explicitly. In those cases, the Department has stated its position as follows:

Pursuant to ORS 539.040, OWRD has the authority to set the claim filing deadline and to allow extensions to it. Extensions to the initial 1991 filing deadline were allowed for certain types of claims, including the United States’ and Klamath Tribes’ claims, for a number of reasons, such as pending litigation or the collection of additional information.

(KBA Case 277 at 5 and 6 fn. 27; *See also*, Case 279 at 4 and 5 fn. 26, Case 280 at 5 fn. 24, and Case 281 at 4 fn. 23.) In such cases, OWRD appears to take the position that the time required by law under ORS 539.210 is subject to its authority to grant extensions under ORS 539.040. In each of these cases, the initial claim filing deadline was established, as here, as April 30, 1997. In each of these cases, as here, Claimants’ filed amended claims prior to the commencement of the period for open inspection. In each of these cases, unlike here, neither OWRD nor Contestants made any objection to the amended claims filed prior to the open inspection period. To the contrary, in each of these cases, OWRD affirmatively argued that amended claims were permissible up to the commencement of open inspection.

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Under ORS 539.040, the Department may grant extensions to the claim filing deadlines and did so in several cases throughout this adjudication. As such, ORS 539.210 does not compel denial of the amended claims if such extensions were permitted by OWRD. OWRD contends that, while it may grant extensions for filing claims, no such extension was granted here and thus claims or amendments filed after April 30, 1997 were prohibited. While not implausible, this position is inconsistent with a written expression of the Department's position contained in the 1998 letter from the Adjudicator.

1. The 1998 letter from OWRD.

Pursuant to ORS 539.210, OWRD established April 30, 1997 as the deadline for Claimants to file claims in this adjudication. The claims at issue here were filed on or before that date. Thereafter, Claimants requested information from the Department regarding the process for amending claims in this adjudication. OWRD, through the Adjudicator, issued a letter advising Claimants how to submit claim amendments. The letter also informed Claimants that the Department did not intend to close the amendment period before commencement of open inspection, and would accept claim amendments for filing until the close of business on the day before commencement of open inspection. The letter, on its face, clearly applied to this adjudication. No party contests these facts. Further, no party disputes Claimants filed their amended claims prior to the commencement of open inspection.

Despite these uncontested facts, OWRD argues it did not grant Claimants permission to file amended claims. Rather than disputing the plain language of the Adjudicator's letter to Claimants, OWRD relies on its interpretation of the term "amended claim." OWRD argues that, while this letter clearly states amendments would be permitted, it did not specify which types of amendments were permissible. To support its arguments, OWRD insists that amended claims do not include claims that enlarge the original claim. Instead, according to OWRD, such claims constitute new claims. This interpretation, read in context of the laws and rules governing this adjudication would render the terms "amendment" and "amended claim" meaningless.

OWRD takes the position that any alteration to a claim that enlarges the quantity claimed is not an amendment but a new claim. In prior cases, OWRD has also declared its position that any alteration to a claim that reduces the quantity claimed is not an amendment but a partial withdrawal of the claim. (See, OWRD Closing Argument in KBA Cases 277, 279, 280, and 281.) OWRD's interpretations appear to rob the terms "amendment" and "amended claim" of any meaning. OWRD offers no hypothetical alteration to a claim that would constitute an amendment. Further, OWRD appears to ignore the fact that such interpretations, if accepted, render portions of the statutory and regulatory scheme irrelevant. This is particularly apparent with OAR 690-030-0085.

2. Amended claims under OAR 690-030-0085.

OAR 690-030-0085 governs amendments or alterations of claims and provides, in relevant part:

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(1) * * * [T]he Water Resources Director (Director) may not permit any alteration or amendment of the original claim *after the period for inspection has commenced*; but any new matter that the claimant may wish to set forth must be set forth in the form of an affidavit, regularly verified before a proper officer and filed with the Director prior to the close of the period for public inspection.

(Emphasis added.)

While UBC relies on the above rule to support the proposition that amendments to claims are prohibited, OWRD correctly asserts OAR 690-030-0085 is inapplicable to Claimants' amended claims because they were filed prior to the period for open inspection. I agree the rule does not expressly prohibit the amended claim filings. Nonetheless, within the context of the 1998 letter from OWRD, as well as the Department's position in prior cases, the cited rule is relevant to Claimants' interpretation of whether amended claims were permissible in this case.

An agency's interpretation of its own validly promulgated administrative rule is entitled to deference unless "inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law * * *." *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881 P2d 119 (1994). Pursuant to *Don't Waste Oregon*, an agency's interpretation is erroneous and therefore not entitled to deference only if it is: 1) implausible; 2) inconsistent with the wording of the rule; 3) inconsistent with the context of the rule; or 4) inconsistent with any other source of law. *Don't Waste Oregon*, 320 Or at 142.

In this instance, deference cannot be granted to the Department's interpretation as it would render the cited rule meaningless and irrelevant. Under OWRD's interpretation of "amendment," this rule appears meaningless. OAR 690-030-0085 implies, by its language, that claim amendments are permissible prior to the commencement of the period for open inspection. This interpretation is supported by OWRD's position expressed in the 1998 letter from the Adjudicator. The Department's interpretation is inconsistent with the wording of the rule as well as its own express position in this adjudication.

Here, in light of the position expressed by OWRD in the 1998 letter, the Department's interpretations of ORS 539.210 and OAR 690-030-0085 are implausible and inconsistent with the wording and context of the statute and rule. It is also inconsistent with the position taken by OWRD in at least four other cases in this adjudication involving, to a great extent, the same parties, rights, and issues as those addressed here. Accordingly, Claimants' amended claims, filed prior to the commencement of the period for open inspection, are not prohibited by statute or rule in this adjudication.

IV. Claimants have demonstrated certain spring flows are necessary to establish and maintain a healthy and productive habitat for treaty species.

As identified throughout this order, the purpose of this adjudication is the quantification of water rights within the Klamath Basin. Specifically at issue here is the quantification of the Tribes' non-consumptive water rights on former reservation land within the basin. Such water rights are limited by the amount of water necessary to allow the Tribes to exercise their treaty protected hunting, fishing, trapping, and gathering rights. This amount has been interpreted,

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throughout this adjudication, as the amount of water necessary to establish and maintain a "healthy and productive habitat that will enable the Tribes to exercise their aboriginal rights." (Amended Order at 16.)

The Tribes' aboriginal rights apply to those species of fish, fowl, wildlife, and plants traditionally or historically relied upon by the Tribes for subsistence, cultural, and religious practices. At hearing, the Tribes demonstrated the extensive nature of treaty wildlife species that rely upon the seeps and springs as well as the adjacent riparian habitat. The Tribes also demonstrated that, without a healthy and productive riparian habitat, these species have diminished in both quantity and quality. In addition, the Tribes established the seeps and springs are necessary, not at a particular location but throughout the entirety of the former reservation to support treaty species that roam the territory.

A healthy and productive habitat is one that will support a viable and self-renewing population of all treaty species to enable the Tribes to exercise their treaty protected rights. As identified previously, Claimants' burden in this matter is to prove, by a preponderance of the evidence, the level of flow necessary in a given seep or spring to establish and maintain a healthy and productive habitat for treaty species. As discussed below, I find Claimants have satisfied their burden.

Dr. Raedeke, on behalf of Claimants, determined certain treaty species on former reservation lands require seeps and springs to provide necessary water within the vast areas between rivers and streams within the basin. Dr. Raedeke also concluded that, where surface water is not present, succulent vegetation surrounding the spring can provide water requirements for species such as deer and elk as they travel between water sources.

Several plant and animal species thrive within the riparian environments surrounding the springs in this case. Many of the treaty species of plants serve as food staples for tribal members. Others have pharmacological or religious uses. Further, many wildlife treaty species hunted by the Tribes rely on the riparian environments for forage, shelter, and reproduction. This habitat is also necessary to attract wildlife species to springs as they roam throughout the former reservation.

Claimants' spring flow claims seek to capture the water necessary to establish and maintain healthy and productive riparian habitats for those treaty species dependent upon such environments. To develop the claims, Claimants again engaged in extensive study of the spring sites to determine the minimum amount of water necessary to fulfill the purposes of the reservation. Claimants' experts were able to determine that current spring flows, if preserved, would be sufficient to provide healthy and productive habitat for treaty species.

V. Contestants failed to rebut Claimants' evidence.

Contestants assert Claimants have failed to prove the flows claimed are the minimum amount necessary to establish a healthy and productive habitat. I disagree. Based on the foregoing discussion, I find each of the claims presented represents the minimum amount of water necessary to fulfill the purposes of the reservation.

Between 1999 and 2009, Claimants continued to collect data and perform analysis aimed at finding the minimum amount of water necessary for the seeps and springs claimed. Based, in part, on information not available in 1999, Claimants reduced the flows claimed at many of the seeps and springs sites. Further, Claimants were able to determine over 30 sites, listed on the amended claims, where it was appropriate to abandon the claimed rights. The results were updated claims, capped by the 1999 claim level, which claimed water in 140 seeps and springs, rather than 172. This translates into lower claim levels as reflected in Attachment A. I find Claimants have demonstrated, by a preponderance of the evidence, the claimed flows represent the minimum amount necessary.

In the alternative, Contestants argue Claimants water rights should be limited based on equitable considerations. This argument is unavailing in light of the well-established body of controlling case law.

Where reserved rights are properly implied, they arise without regard to equities that may favor competing water users. *Coleville Confederated Tribes v. Walton*, 752 F.2d at 405 (1984), citing *Cappaert v. United States*, 426 US 128, at 138 through 139. Accordingly, despite the urgings of UBC and other Contestants, this tribunal is not free to balance the interests of the Tribes and non-Indian water users in order to effectuate an equitable distribution of water.

Contestants rely on *City of Sherrill v. Oneida Indian*, 544 U.S. 197 (2005) for the proposition that equitable considerations can and should be applied to curtail the rights of federally recognized Indian tribes. Without addressing substance of Contestants legal argument, I find *Sherrill* distinguishable from this case.

Sherrill involved issues surrounding land sold off by the Oneida nation and settled by residents of New York State. Approximately two hundred years later, the Oneida began reacquiring former reservation land through purchases on the open market. The Oneida then sought immunity from property taxes assessed by the City of Sherrill on the reacquired land. The court applied equitable considerations to prevent the Oneida from reviving sovereignty over the lands finding, “[t]he Oneida long ago relinquished governmental reins and cannot regain them through open-market purchases * * *.” *Sherrill*, 544 U.S. at 198.

Sherrill involved the tribe’s abandonment of control over former reservation land, not treaty rights never abandoned or abolished. In *Sherrill*, the Oneida Indian Nation knowingly relinquished title and control over the subject lands. Two hundred years later, the tribes sought to renew sovereign control over that same land. In this matter, the Klamath Tribes have not, knowingly or otherwise, relinquished the treaty rights they now seek to enforce. The circumstances that permitted the application of equitable principle in *Sherrill* are absent here. Accordingly, I decline the invitation to discard the principles set forth in *Walton* and *Cappaert* identified above.

1. *Contestants focus on irrelevant issues (i.e., “causal connection” between ability to exercise treaty rights and flows claimed; requirement that Tribes quantify harvest of treaty resources; etc.)*

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UBC contend, for the first time in responsive briefs, Claimants are required to establish a “causal connection” between the Tribes’ ability to exercise their treaty rights and the flows necessary to accomplish this purpose. At base, this argument appears to simply reiterate previous arguments in favor of UBC’s interpretation the “as currently exercised” and “moderate living” phrases found in the *Adair* cases. UBC’s proffered interpretation of the “as currently exercised” has been disposed of by ALJ Russell in the Amended Order. I decline any invitation to revisit that issue here. To the extent UBC’s “causal connection” pertains to the quantification of tribal resource use and/or the “moderate living” phrase, those issues have been disposed of in preceding sections of this order.

2. The Tribes’ alleged movement away from reliance on treaty species is irrelevant to the quantification of instream water rights.

Many of UBC’s arguments seem to advocate for the abrogation of the Tribes’ treaty rights due to a suggested movement away from reliance on treaty resources. Such arguments miss the mark. Only congress can abrogate Indian treaty rights and it has not done so here. The Tribes’ reliance upon treaty resources is irrelevant to this quantification proceeding. While it may arguably be relevant to a congressional body in deciding whether to efface certain treaty rights, it is not information that tends to prove or disprove the amount of water necessary to establish and maintain a healthy and productive habitat for treaty species. It follows that Contestants’ evidence in support of such arguments, unless also offered for another purpose, is irrelevant.

VI. Treaty rights on land no longer owned by the Klamath Tribes.

Next, UBC argues the Tribes no longer possess treaty rights on lands not owned by the Tribes. Again, UBC’s argument is unavailing. Contestants seem to continually lose site of the scope of these proceedings. As declared above, the purpose of this adjudication is the quantification of Claimants instream water rights necessary to support healthy and productive instream and riparian habitats within the former reservation. Here, UBC continues to argue in favor of limitations on Claimants’ water rights through abrogation, in whole or in part, of the Tribes’ treaty rights to hunt, fish, gather, and trap within the boundaries of the former reservation. Such rights were confirmed by the Ninth Circuit well over two decades after termination of the reservation and the sale of much of the lands therein. (See, *Adair II.*) An analysis of property ownership within the boundaries of the former reservation is unhelpful in these proceedings. Determinations of the extent of the Tribes’ treaty rights are beyond the scope of this quantification proceeding and concomitantly exceed the authority of the ALJ.

VII. The Klamath Restoration Act did not limit the restoration of the Tribes’ treaty rights.

UBC also contends the Klamath Restoration Act (25 U.S.C. § 566 et. seq.) imposed limitations on the restoration or exercise of the Tribes’ treaty right. Specifically, UBC argues the express language of 25 U.S.C. § 566c excludes the Tribes treaty rights from restoration. This argument is unavailing.

25 U.S.C. § 566 restored federal recognition of the Klamath Tribes and provides, in relevant part:

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* * * * *

(b) Restoration of rights and privileges - All rights and privileges of the tribe and the members of the tribe under any Federal treaty, Executive order, agreement, or statute, or any other Federal authority, which may have been diminished or lost under the [termination] Act * * * are restored, and the provisions of such Act, to the extent that they are inconsistent with this subchapter, shall be inapplicable to the tribe and to members of the tribe after August 27, 1986.

25 U.S.C. § 566a provides:

Nothing in this subchapter shall affect in any manner any hunting, fishing, trapping, gathering, or water right of the tribe and its members.

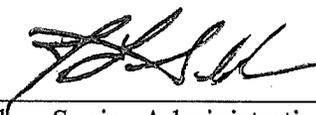
The restoration act went in to effect seven years after the district courts recognition of the survival of the Tribes' treaty rights and three years after the Ninth Circuit's confirmation of same. Nonetheless, UBC still reads the restoration act as a limitation on the Tribes' treaty rights.

In *Adair I*, the court stated, "[t]reaty hunting and fishing rights for the Tribe, for all its members on the final tribal roll and for their descendants survived the termination of the Reservation." (Internal citations omitted.) 478 F. Supp at 345. This language unequivocally declares the Tribes' treaty rights survived termination. Nothing in the termination act, or the court's opinion cited herein, can be read to indicate Congress intended to abrogate any portion of those rights. A limitation on the Tribes' treaty rights is nothing more than partial abrogation of those rights. In this context, Congress passed the restoration act with a full understanding of the Tribes' treaty rights. Thus, by the plain language of the restoration act, nothing in that act disturbs the treaty rights that survived termination. Accordingly, any argument in favor of partial or complete abrogation of treaty rights based upon the termination or restoration acts must fail.

ORDER

I propose OWRD issue the following order:

1. The claimed seep and spring flows, reflected in Attachment A, are necessary to establish a healthy and productive habitat to allow the exercise of the Klamath Tribes' hunting, fishing, trapping, and gathering rights guaranteed by the treaty of 1864.
2. Claims 614 and 625 are approved as reflected in Attachment A.



Joe L. Allen, Senior Administrative Law Judge
Office of Administrative Hearings

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NOTICE TO THE PARTIES:

If you are not satisfied with this Order you may:

EXCEPTIONS: Parties may file exceptions to this Order with the Adjudicator within 120 days of service of this Order. OAR 137-003-0650.

Exceptions may be made to any proposed finding of fact, conclusion of law, summary of evidence, or recommendations of the Administrative Law Judge. A copy of the exceptions shall also be delivered or mailed to all participants in this contested case.

Exceptions must be in writing and must clearly and concisely identify the portions of this Order excepted to and cite to appropriate portions of the record to which modifications are sought. Parties opposing these exceptions may file written arguments in opposition to the exceptions within 90 days after completion of the 120-day period for exceptions in case 285.

Any exceptions or arguments in opposition must be filed with the Adjudicator at the following address:

**Dwight W. French, Adjudicator
Klamath Basin Adjudication
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem OR 97301**

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CERTIFICATE OF SERVICE

I hereby certify that on **December 1, 2011**, I mailed a true copy of the following **PROPOSED ORDER**, by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

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KBA Case No. 285 - Attachment A - Monthly Flow Values

(The table below is taken from pages 116-127 of KBA Case No. 285, Affidavit and Direct Examination of Clair Yoder, Ex. 285-US-100; also submitted as Attachment A to Claimant United States Bureau of Indian Affairs' and Claimant Klamath Tribes' Joint Opening Post-Hearing Brief)

Table 3: Updated Seeps and springs claim information

Site #	Name	Updated 2010 Claim (cfs)	Amended 1999 Claim (cfs)	Elevation (ft)	UTM East	UTM North	Distance (ft)	Bearing	From Corner	Township, Range, Section, Quarter, Quarter
<i>Applegate Butte (Amended 1999 Claim, OWRD Ex. 62, p. 117)</i>										
174	Unnamed Spring	0.001	0.005	4,568	607769.9	4730416.4	1,049	N52°34'5"W	SE	33S, 9E, 7, SE, SE
194	Miranda Spring	0.022	0.022	4,520	608147.9	4720813	785	N0°30'54"W	SE	34S, 9E, 7, SE, SE
6000	Beaver Dam Spring	0.005	0.005	4,590	611790.1	4732484	2,741	N42°51'11"E	SW	33S, 9E, 3, NE, SW
6003	Withdrawn									
6006	Withdrawn									
6007	Withdrawn									
6008	Unnamed Spring	0.005	0.005	4,570	609464.6	4730574	1,276	N26°52'22"W	SE	33S, 9E, 8, SE, SE
6010	Withdrawn									
9050	Unnamed Spring	0.06	0.06	4,639	607374.4	4730223.4	2,130	N89°53'18"W	SE	33S, 9E, 7, SW, SE
<i>Bear Butte (Amended 1999 Claim, OWRD Ex. 62, p. 118)</i>										
340	Dealy Spring	0.004	0.004	5,100	627466.5	4764550	2,358	N62°26'4"W	SE	29S, 11E, 29, SW, SE
343	Withdrawn									
344	Unnamed Spring	0.0008	0.005	4,620	623360.9	4765541	930	S41°36'52"E	NW	29S, 10E, 25, NW, NW
<i>Beatty (Amended 1999 Claim, OWRD Ex. 62, p. 119)</i>										
6171	Unnamed Spring	0.001	0.005	4,540	640991.8	4693061	2,098	S25°24'7"E	NW	37S, 12E, 10, SW, NW
<i>Buckhorn Springs (Amended 1999 Claim, OWRD Ex. 62, p. 120)</i>										
81	Withdrawn									
84	Buckhorn Spring	0.005	0.005	4,760	620851.1	4738482	369	S83°41'46"E	NW	32S, 10E, 22, NW, NW
85	Unnamed Spring	0.005	0.005	4,750	620972.1	4737427.2	1,941	N17°11'55"E	SW	32S, 10E, 22, NW, SW
87	Unnamed Spring	0.005	0.005	4,680	622371.1	4735978.2	2,259	N5°57'2"W	SE	32S, 10E, 27, NE, SE
88	Withdrawn									
6194	Telephone Draw	0.002	0.005	4,760	619890.3	4739032	3,089	N52°49'50"E	SW	32S, 10E, 16, NE, SW
11002	Corral Spring	0.005	0.005	4,647	613767.3	4747595.8	1,963	S44°22'3"W	NE	31S, 9E, 23, SW, NE
<i>Buttes of the Gods (Amended 1999 Claim, OWRD Ex. 62, p. 121)</i>										
6201	Withdrawn									
6209	Unnamed Spring	0.001	0.005	4,645	613216.3	4708395	2,032	N2°0'6"E	SW	35S, 9E, 23, NW, SW
11030	Withdrawn									
<i>Calimus Butte (Amended 1999 Claim, OWRD Ex. 62, p. 122)</i>										
431	North Calimus Spring	0.002	0.005	4,600	614133.8	4723162	2,690	S33°17'10"W	NE	34S, 9E, 2, SW, NE
6214	Unnamed Spring	0.001	0.005	4,780	614247.9	4731076.3	2,590	N16°1'51"W	SE	33S, 9E, 11, NE, SE
6215	Unnamed Spring	0.005	0.005	4,840	614388.3	4730191	500	S41°30'12"W	NE	33S, 9E, 14, NE, NE
6216	Unnamed Spring	0.005	0.005	4,960	615551.4	4729071	2,154	N58°13'30"W	SE	33S, 9E, 13, SW, SE
6218	Unnamed Spring	0.002	0.005	5,100	615794.9	4725002.3	2,020	S34°27'0"W	NE	33S, 9E, 36, SE, NE
6221	Unnamed Spring	0.005	0.005	4,860	612725.1	4723419	1,542	S26°57'10"W	NE	34S, 9E, 3, NE, NE
6222	Unnamed Spring	0.005	0.005	4,860	612931.6	4722823	1,902	N1°26'52"W	SE	34S, 9E, 3, NE, SE
6223	Unnamed Spring	0.00006	0.005	4,580	613111.7	4721928	1,157	S25°7'50"E	NW	34S, 9E, 11, NW, NW
11011	Flowing Well Spring	0.005	0.005	5,000	619002.2	4733653.1	730	N80°24'4"W	SE	32S, 10E, 32, SE, SE
11012	Unnamed Spring	0.005	0.005	5,400	619996.9	4726685.6	2,713	S51°16'8"E	NW	33S, 10E, 28, SE, NW

<i>Chiloquin (Amended 1999 Claim, OWRD Ex. 62, p. 123)</i>										
185	Grouse Spring	0.002	0.005	4,660	600819.6	4709199	1,705	S84°46'55"E	NW	35S, 8E, 21, NE, NW
189	Crystal Castle Spring	0.005	0.005	4,600	597252.2	4711020	876	N35°37'10"E	SW	35S, 8E, 7, SW, SW
6238	Unnamed Spring	0.0006	0.005	4,960	598958.8	4713011.6	2,142	N25°45'4"E	SW	35S, 8E, 5, NW, SW
6239	Unnamed Spring	0.002	0.005	4,800	600154.7	4711676	2,564	S8°42'45"W	NE	35S, 8E, 6, NW, NW
11006	Withdrawn									
<i>Cooks Mountain (Amended 1999 Claim, OWRD Ex. 62, p. 124)</i>										
125	Dibbor-Cook Spring	0.005	0.005	4,810	625592.2	4711860	2,661	N29°3'33"W	SE	35S, 10E, 12, NW, SE
130	Unnamed Spring	0.005	0.005	5,050	628236.1	4714829	2,741	N58°8'45"E	SW	34S, 11E, 32, NE, SW
517	Unnamed Spring	0.0008	0.005	4,995	629054.6	4712179	2,032	S13°30'25"W	NE	35S, 11E, 8, SE, NE
6297	Withdrawn									
6300	Withdrawn									
6301	Unnamed Spring	0.005	0.005	4,980	629109.4	4711632	1,633	N9°44'0"W	SE	35S, 11E, 8, NE, SE
<i>Dry Prairie (Amended 1999 Claim, OWRD Ex. 62, p. 125)</i>										
6423	Chipmunk Spring	0.005	0.005	5,200	651506.9	4692827	2,502	N37°58'48"W	SE	37S, 13E, 10, NW, SE
6425	Unnamed Spring	0.11	0.11	5,300	645182.3	4691058	2,445	N35°32'31"W	SE	37S, 12E, 13, NW, SE
<i>Ferguson Mountain (Amended 1999 Claim, OWRD Ex. 62, p. 126)</i>										
3390	Fawn Spring	0.005	0.005	5,120	649195.7	4694173	1,961	N48°25'55"E	SW	37S, 13E, 4, NE, SW
6482	Withdrawn									
6484	Withdrawn									
11035	Unnamed Spring	0.009	0.1	5,002	646231.2	4696678.7	2,373	S71°6'5"E	NW	36S, 13E, 31, NE, NW
<i>Fort Klamath (Amended 1999 Claim, OWRD Ex. 62, p. 127)</i>										
11013	Unnamed Spring (Reservation Spring)	0.005	0.005	4,594	585073	4728102.7	1,842	S64°47'40"W	NE	33S, 7.5E, 23, NW, NE
11014	Unnamed Spring	23	25	4,563	584968.4	4726717.3	2,083	S89°29'44"W	SE	33S, 7.5E, 23, SW, SE
11015	Unnamed Spring	4.2	9.6	4,500	584939.5	4726329.8	2,531	S59°21'53"W	NE	33S, 7.5E, 26, NW, NE
11017	Bullfrog Spring	0.003	0.005	4,391	589068.8	4722504.5	1,950	N17°15'11"E	SW	34S, 7E, 5, NW, SW
11018	Head of Spring Creek	0.005	0.005	4,255	591291.8	4724445.7	3,434	S45°22'16"W	NE	33S, 7E, 33, SW, NE
<i>Fuego Mountain (Amended 1999 Claim, OWRD Ex. 62, p. 128)</i>										
18	Withdrawn									
22	Wildhorse Spring	0.1	0.1	4,960	625700.2	4726679	2,266	S11°23'56"W	NE	33S, 10E, 25, SE, NE
6523	Withdrawn									
6664	Head of the River Spring	0.005	0.005	4,600	629513.7	4732029	2,599	S87°7'29"E	NW	33S, 11E, 9, NE, NW
6665	Head of the River Spring	0.005	0.005	4,600	629433.3	4731959	2,355	S81°19'15"E	NW	33S, 11E, 9, NE, NW
<i>Gordon Lake (Amended 1999 Claim, OWRD Ex. 62, p. 129)</i>										
6546	Unnamed Spring	0.002	0.005	4,680	622407.9	4756506	2,590	N56°2'2"E	SW	30S, 10E, 23, NE, SW
6549	Unnamed Spring	0.5643	0.5643	4,840	626756	4756326.8	938	N40°14'36"E	SW	30S, 11E, 20, SW, SW
6550	Unnamed Spring	0.22	0.5643	4,840	626949.3	4756314	1,312	N64°37'18"E	SW	30S, 11E, 20, SW, SW
6551	Unnamed Spring	0.03	0.1	6,960	632210.2	4756449	2,630	N77°34'54"E	SW	30S, 11E, 23, SE, SW
<i>Modoc Point (Amended 1999 Claim, OWRD Ex. 62, p. 130)</i>										
230	Shell Rock Spring	0.01	0.01	5,200	602797.7	4696661.9	2747	N66°5'36"E	SW	36S, 8E, 27, SE, SW
11024	Onyx Spring	0.005	0.005	4,164	596952.7	4694551.5	2182	S71°0'25"W	NE	37S, 8E, 1, NW, NE

<i>Pomina Butte (Amended 1999 Claim, OWRD Ex. 62, p. 131)</i>										
3280	Electric Pond	0.002	0.005	5,160	650845.7	4720509	3223	S44°15'23"W	NE	34S, 13E, 15, SW, NE
3283	Frying Pan Spring	0.005	0.005	4,860	652713.5	4717190	3007	N32°13'41"W	SE	34S, 13E, 26, NW, SE
3289	Ponina Spring	0.1	0.1	5,260	646209.3	4714967	2285	N54°2'12"W	SE	34S, 13E, 31, SW, SE
3299	Mill Creek Spring	0.1	0.1	4,980	648221.3	4712688	1763	S33°43'33"W	NE	35S, 13E, 8, SE, NE
6767	Unnamed Spring	0.001	0.005	5,640	644294.5	4719476	2574	N88°51'36"W	SE	34S, 12E, 13, SW, SE
6768	Unnamed Spring	0.005	0.005	5,240	647080.4	4717542	1678	S41°12'3"E	NW	34S, 13E, 29, NW, NW
6770	Unnamed Spring	0.005	0.005	4,880	652366.2	4717576	2887	S58°36'20"E	NW	34S, 13E, 26, SE, NW
<i>Riverbed Butte Springs (Amended 1999 Claim, OWRD Ex. 62, p. 132)</i>										
220	Withdrawn									
3135	Watkin Spring	0.0006	0.005	5,130	652845.7	4724314	861	S37°15'17"W	NE	34S, 13E, 2, NE, NE
3141	Withdrawn									
3143	Unnm Spring	0.005	0.005	5,240	646296.9	4720670	1,972	S39°45'47"W	NE	34S, 13E, 18, SW, NE
6858	Unnm Spring	0.00003	0.005	5,185	645055	4734101	1,015	N70°24'5"E	SW	32S, 13E, 31, SW, SW
6864	Unnm Spring	0.002	0.005	5,050	652283.6	4725169	3,160	N47°6'23"W	SE	33S, 13E, 35, NW, SE
6867	Black Hills Guard Station	0.002	0.005	5,200	644499.6	4722733	1,683	N86°6'41"W	SE	34S, 12E, 1, SW, SE
6868	Withdrawn									
11027	Withdrawn									
<i>Rodman Rock (Amended 1999 Claim, OWRD Ex. 62, p. 133)</i>										
574	Withdrawn									
576	Withdrawn									
<i>Round Butte (Amended 1999 Claim, OWRD Ex. 62, p. 134)</i>										
40	Marv Stump Spring	0.005	0.005	4,600	610377.2	4768594	829	S16°25'10"E	NW	29S, 9E, 15, NW, NW
11028	Withdrawn									
<i>S' Ocholis Canyon (Amended 1999 Claim, OWRD Ex. 62, p. 135)</i>										
98	Cedar Springs	0.004	0.005	5,140	608419.6	4707796	449	N47°21'12"E	SW	35S, 9E, 20, SW, SW
99	Unnm Spring	0.0045	0.0045	4,940	606510.9	4707040	2,203	S22°37'19"W	NE	35S, 8E, 25, SE, NE
102	Unnm Spring	0.001	0.005	4,860	607483.7	4708889.5	2,819	S61°44'16"E	NW	35S, 9E, 19, SE, NW
7017	Withdrawn									
7018	Unnm Spring	0.11	0.11	5,200	606347.8	4706341	1,753	N55°6'45"W	SE	35S, 8E, 25, SW, SE
<i>Silver Dollar Flat (Amended 1999 Claim, OWRD Ex. 62, p. 136)</i>										
251	Unnm Spring	0.0008	0.005	4,920	639016.8	4725442	2,099	S53°47'28"E	NW	33S, 12E, 33, NE, NW
252	Unnm Spring	0.005	0.005	4,900	638634.9	4726228	1,449	N22°31'0"E	SW	33S, 12E, 28, NW, SW
6945	Unnm Spring	0.005	0.005	5,090	636290.6	4729111	1,761	N78°54'5"W	SE	33S, 12E, 18, SW, SE
6946	Unnm Spring	0.005	0.005	5,045	639190.3	4729469	2,870	N61°55'10"E	SW	33S, 12E, 16, NE, SW
6948	Torrent Spring	0.002	0.005	4,900	641559.8	4728125	2,196	N9°48'0"W	SE	33S, 12E, 22, NE, SE
6955	Withdrawn									
6956	Unnm Spring	0.005	0.005	5,060	641516.6	4723202	2,016	N24°8'31"W	SE	34S, 12E, 3, NE, SE
8013	Unnm Spring	0.003	0.005	4,875	639182.5	4725860	2,332	N87°33'17"E	SW	33S, 12E, 28, SE, SW
11019	Unnm Spring	0.005	0.005	5,100	640294.4	4722834.8	755	N31°9'9"E	SW	34S, 12E, 3, SW, SW
<i>Soloman Butte (Amended 1999 Claim, OWRD Ex. 62, p. 137)</i>										
262	Williamson River Camp	0.002	0.005	4,180	594165.8	4723181.5	2,351	S59°31'22"E	NW	34S, 7E, 2, NE, NW
7023	Unnm Spring	0.005	0.005	4,210	595174	4722972	2,017	S8°47'46"W	NE	34S, 7E, 2, SE, NE
7026	Unnm Spring	0.005	0.005	4,709	598560.6	4722235	662	N26°47'43"E	SW	34S, 8E, 5, SW, SW
7027	Unnm Spring	0.002	0.002	4,480	600016.1	4721849	816	S20°56'43"W	NE	34S, 8E, 8, NE, NE
7029	Unnm Spring	0.005	0.005	4,220	593444.3	4721494	1,873	S36°5'53"W	NE	34S, 7E, 10, SE, NE
11003	Withdrawn									
11004	Unnm Spring	0.005	0.005	4,291	595214.2	4722368.5	1,355	N13°22'49"W	SE	34S, 7E, 2, SE, SE

11010	Unnamed Spring	0.002	0.005	4,593	601969.4	4726084.7	2,677	N19°40'17"E	SW	33S, 8E, 27, NW, SW
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<i>Spodue Mountain (Amended 1999 Claim, OWRD Ex. 62, p. 138)</i>										
3267	Bob Plank Spring	0.001	0.005	5,720	642945.5	4717386	2,417	S52°25'56"W	NE	34S, 12E, 26, SW, NE
3273	Bitter Spring	0.0018	0.0018	4,840	636575.1	4716582	2,281	N47°12'41"W	SE	34S, 12E, 30, NW, SE
3274	Brush Spring	0.0002	0.005	4,840	637002.6	4716219	445	N41°1'18"W	SE	34S, 12E, 30, SE, SE
7044	Cordelia Flat	0.005	0.005	4,990	637295.8	4720257	2,603	S23°25'37"E	NW	34S, 12E, 17, SW, NW
7046	Elde Flat	0.005	0.005	4,834	636731.1	4718532	2,766	N21°13'37"W	SE	34S, 12E, 28, NW, NW
7047	Blue Creek Spring	0.02	0.02	4,870	638721.3	4717674	373	S16°15'6"E	NW	34S, 12E, 21, SW, SE
7048	Unnamed Spring	0.001	0.005	4,930	639594.1	4717947	2,349	N79°20'36"W	SE	34S, 12E, 26, NE, NW
7049	Withdrawn									
<i>Sprague River East (Amended 1999 Claim, OWRD Ex. 62, p. 139)</i>										
166	SE-6	0.005	0.005	~5,240	625989	4693280	897	S75°7'7"W	NE	37S, 11.5E, 12, NE, NE
<i>Sprague River West (Amended 1999 Claim, OWRD Ex. 62, p. 140)</i>										
158	Unnamed Spring	0.005	0.005	4,740	623156.1	4697390	2,537	N17°22'45"E	SW	36S, 10E, 26, NW, SW
159	Withdrawn									
160	Robin Spring	0.0009	0.005	4,700	620803.6	4696548	1,759	S80°30'50"W	NE	36S, 10E, 33, NW, NE
161	Unnamed Spring	0.005	0.005	4,680	621943.3	4697548	3,122	S40°47'13"E	NW	36S, 10E, 27, SE, NW
162	Unnamed Spring	0.09	0.09	4,720	621915.1	4697384	3,089	N39°24'9"E	SW	36S, 10E, 27, NE, SW
164	Unnamed Spring	0.003	0.005	4,650	619121.8	4697645.3	2,650	S47°5'57"W	NE	36S, 10E, 29, SW, NE
7145	Unnamed Spring	0.005	0.005	4,565	621710.9	4697803	1,989	S40°31'35"E	NW	36S, 10E, 27, SW, NW
<i>Sugarpine Mountain (Amended 1999 Claim, OWRD Ex. 62, p. 141)</i>										
27	Kicking Horse Spring	0.005	0.005	4,860	618841	4769168	1,830	N67°31'42"E	SW	29S, 10E, 9, SE, SW
360	Bedpan Spring	0.005	0.005	4,590	617131.6	4763435	2,403	S27°35'32"E	NW	29S, 10E, 32, SW, NW
361	Deer Scaffold Spring	0.002	0.005	4,680	621206.3	4766917	1,752	S39°35'38"W	NE	29S, 10E, 22, NE, NE
7166	Unnamed Spring	0.005	0.005	4,615	619464.1	4764568	2,278	N48°5'54"W	SE	29S, 10E, 28, NW, SE
7167	Withdrawn									
11023	Sheep Spring	0.005	0.005	4,898	615349.6	4770405.8	865	S66°31'20"E	NW	29S, 10E, 7, NW, NW
<i>Sun Pass (Amended 1999 Claim, OWRD Ex. 62, p. 142)</i>										
297	Unnamed Spring	0.0006	0.005	4,940	590284.4	4734365	1,661	S0°13'8"W	NE	32S, 7E, 32, SE, NE
298	Egan Springs	0.196	0.196	4,760	591276.9	4737834	2,041	S65°16'32"W	NE	32S, 7E, 21, NW, NE
299	Unnamed Spring	0.0006	0.005	4,854	589933.8	4738662.5	2,089	N27°46'11"W	SE	32S, 7E, 17, NE, SE
<i>Swan Lake Point (Amended 1999 Claim, OWRD Ex. 62, p. 143)</i>										
140	Unnamed Spring	0.005	0.005	6,120	606666.3	4697437	2,077	S20°18'16"W	NE	36S, 8E, 25, SE, NE
7203	Unnamed Spring	0.1	0.1	5,480	609958.3	4701269	244	S80°20'57"W	NE	36S, 9E, 17, NE, NE
7204	Unnamed Spring	0.005	0.005	5,480	609870.1	4701118	755	S45°29'37"W	NE	36S, 9E, 17, NE, NE
7205	Unnamed Spring	0.15	0.3	5,480	609930.2	4700825	1,539	S13°29'37"W	NE	36S, 9E, 17, SE, NE
7206	Unnamed Spring	0.22	0.5	5,400	609987.1	4700670	2,015	S5°9'10"W	NE	36S, 9E, 17, SE, NE
7208	Unnamed Spring	0.07	0.3	5,530	609749.1	4699290	1,635	S36°23'46"W	NE	36S, 9E, 20, NE, NE
7210	Unnamed Spring	0.006	0.0064	~5,500	609924.1	4698310	886	N33°4'26"W	SE	36S, 9E, 20, SE, SE
7211	Unnamed Spring	0.006	0.0064	5,610	609934.6	4698218	632	N45°55'39"W	SE	36S, 9E, 20, SE, SE
7212	Unnamed Spring	0.0064	0.0064	~5,500	610124.4	4698256	578	N17°10'54"E	SW	36S, 9E, 21, SW, SW
7214	Unnamed Spring	0.005	0.005	6,335	607002.6	4696135	1,089	S19°37'40"E	NW	36S, 9E, 31, NW, NW
<i>The Bull Pasture (Amended 1999 Claim, OWRD Ex. 62, p. 144)</i>										
7288	Withdrawn									
<i>Wildhorse Ridge (Amended 1999 Claim, OWRD Ex. 62, p. 145)</i>										
8	Unnamed Spring	0.0007	0.005	4,780	619483.3	4753319	2,794	N57°13'45"W	SE	30S, 10E, 33, NW, SE
9	Bluejay Spring	0.0006	0.0006	4,780	619553.9	4754103	2,275	S61°26'23"W	NE	30S, 10E, 33, NW, NE
12	South Flat Spring	0.037	0.037	4,580	619453.1	4756019	2,159	S88°20'18"W	NE	30S, 10E, 28, NW, NE
501	Unnamed Spring	0.002	0.005	4,550	616337.4	4752262	2,934	S47°46'34"E	NW	31S, 10E, 6, SE, NW

<i>Wocus Bay (Amended 1999 Claim, OWRD Ex. 62, p. 146)</i>										
52	Unnamed Spring	0.005	0.005	4,570	610084.9	4735357	1,921	N61°11'11"E	SW	32S, 9E, 28, SE, SW
53	Unnamed Spring	0.005	0.005	4,595	606173.1	4735082	736	N67°47'2"W	SE	32S, 8E, 25, SE, SE
55	Dice Crane Spring	0.01	0.013	4,600	605827.8	4737315	2,873	N35°29'42"W	SE	32S, 8E, 24, NW, SE
59	Withdrawn									
60	Wocus Spring	0.003	0.003	4,640	609210	4741858	1,521	N37°7'9"W	SE	32S, 9E, 5, SE, SE
447	Cabin Spring	0.005	0.005	4,545	603668.3	4734241	2,888	S35°44'6"E	NW	32S, 8E, 35, SE, NW
7387	Withdrawn									
7388	Unnamed Spring	0.0045	0.0045	4,612	605807.3	4736899	2,012	N60°57'52"W	SE	32S, 8E, 24, SW, SE
7390	Forest Spring	0.002	0.005	4,660	611992.1	4734417	3,460	S49°10'34"E	NW	32S, 9E, 34, SE, NW
<i>Yainax Butte (Amended 1999 Claim, OWRD Ex. 62, p. 147)</i>										
3462	John Spring	0.2	0.2	5,034	641560.4	4691091	3,477	N49°41'12"E	SW	37S, 12E, 15, NE, SW
11036	Unnamed Spring	0.001	0.005	4,952	635708.1	4691527.3	1,460	S30°46'20"W	NE	37S, 11E, 13, NE, NE
11037	Deer Spring	0.003	0.005	5,324	634792.7	4690192.2	1,441	S79°33'15"E	NW	37S, 11E, 24, NE, NW
<i>Yamsay Mountain (Amended 1999 Claim, OWRD Ex. 62, p. 148)</i>										
7436	Unnamed Spring	0.01	0.1	6,930	634567.9	4758084	429	N41°60'30"W	SE	30S, 11E, 13, SE, SE
7437	Unnamed Spring	0.06	0.4	6,590	633883.6	4758008	2,539	N87°34'6"W	SE	30S, 11E, 13, SW, SE
7441	Unnamed Spring	0.03	0.175	6,080	633546.8	4756856	2,464	N43°24'36"E	SW	30S, 11E, 24, NE, SW
7463	Unnamed Spring	0.2	0.2	7,120	634510.6	4755766	1,946	S16°27'22"W	NE	30S, 11E, 25, SE, NE
7464	Unnamed Spring	0.2	0.2	7,070	633626.1	4755712.3	2,655	S48°8'7"E	NW	30S, 11E, 25, SE, NW
7465	Unnamed Spring	0.01	0.1	7,355	633519.3	4754819	1,497	N77°0'24"E	SW	30S, 11E, 25, SE, SW
7466	Unnamed Spring	0.04	0.2	7,560	633891	4754677	2,560	S82°34'48"W	NE	30S, 11E, 36, NW, NE
7467	Unnamed Spring	0.005	0.005	7,560	634650	4755087	1,192	N0°47'41"E	SW	30S, 12E, 30, SW, SW
7468	Unnamed Spring	0.0028	0.0028	7,500	634620.4	4754827	458	N10°12'59"W	SE	30S, 11E, 25, SE, SE
7484	Head of Aspen Creek	0.005	0.005	6,960	633098.2	4752563	1,690	S5°30'46"W	NE	31S, 11E, 2, SE, NE
7485	Head of Deep Creek	0.04	0.5	7,090	634057.8	4752609	2,535	S50°42'56"W	NE	31S, 11E, 1, SW, NE
7488	Unnamed Spring	0.02	0.1	6,890	634226.2	4751812	1,934	N62°55'45"W	SE	31S, 11E, 1, SW, SE